LIBRARY
SUPREME COURT U.S.

No. .....

Supreme Court of the United States

OCTOBER TERM, 1954

UNITED GAS PIPE LINE COMPANY,
Petitioner

v.

MOBILE GAS SERVICE CORPORATION,
FEDERAL POWER COMMISSION,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

THOMAS FLETCHER
C. HUFFMAN LEWIS
Attorneys for Petitioner

WILBERT O. CRAIN
GEORGE D. FISER
WM. T. FLEMING, JR.
J. W. MCCARTNEY
Of Counsel

BORG PRINTING COMPANY OF TEXAS, HOUSTON, TEXAS

TABLE OF CONTENTS

		Page
1.	Opinion of The United States Court of Appeals For The Third Circuit dated September 7, 1954 in #11280 styled Mobile Gas Service Corporation, Petitioner v. Federal Power Commission, Respondent, United Gas Pipe Line Company, Intervener	1-16
2.	Judgment of The United States Court of Appeals For The Third Circuit dated September 7, 1954 in #11280 styled Mobile Gas Service Corporation, Petitioner v. Federal Power Commission, Respondent, United Gas Pipe Line Company, Intervener	17
3.	Order of Federal Power Commission issued December 7, 1953 at Docket G 2227 styled in The Matter of Mobile Gas Service Corporation reviewed in #11280 (Pg. 3a-9a "Appendix to Petitioner's Brief)	18
4.	Provisions of Natural Gas Act Involved (Act of June 21, 1938, Ch. 556, 52 Stat. 821 as amended, 15 U.S.C. 717, et seq.)	24
	Section 1 (a)	24
	(b)	24
	Section 4 (a)	24
	(b)	25
	(c)	25
	(d)	25
	(e)	26
	Section 5 (a)	27

United States Court of Appeals

FOR THE THIRD CIRCUIT

No. 11,280

MOBILE GAS SERVICE CORPORATION,
Petitioner,

v.

FEDERAL POWER COMMISSION,
Respondent,

UNITED GAS PIPE LINE COMPANY,
Intervener.

ON PETITION TO REVIEW AN ORDER OF THE FEDERAL POWER COMMISSION

Argued May 19, 1954

Before McLAUGHLIN, STALEY and HASTIE, *Circuit Judges.*

OPINION OF THE COURT

(Filed September 7, 1954)

By McLAUGHLIN, *Circuit Judge.*

In this proceeding to review an order of the Federal Power Commission the basic question is whether the Commission is correct in holding that under the Natural Gas Act[1] a natural gas company can in effect wipe out a filed rate contract simply by filing an increased rate schedule. Substantially that is what the Commission considers to have happened to petitioner's contract with intervener.

Mobile Gas Service Corporation, the petitioner, is an Alabama distributor of natural gas. It receives its entire supply of that fuel from the intervener, United Gas Pipe

---

[1] 52 Stat. 821-833; 15 U.S.C. Section 717-717w (1952).

Line Company, a Delaware corporation.[2] By a 1936 contract between it and United's predecessor and an agreement entered into in 1941 with United itself certain of Mobile's gas for resale industrially was to be supplied by United for 90% of Mobile's gross resale revenues. The contract provided that the gas was not to be resold industrially for less than 16¢ per MCF (1,000 cubic feet) without United's consent. This agreement as amended by the 1941 contract was to continue in effect until 1962. Both contracts were filed with the Commission and became United's Gas Rate Schedule #20 and Supplement to that Schedule #7.

In 1946 United agreed with Mobile to a proposed arrangement between Mobile and Ideal Cement Company whereby the latter could be supplied with its industrial gas needs by Mobile for 12¢ per MCF for a period of ten years provided total deliveries remained between 100,001 and 400,000 MCF per month. In accordance with this United consented to accept the percentage rate of Mobile's sales to Ideal though this would be less than the minimum of 16¢ per MCF. United also agreed at that time to reduce the price of industrial gas to Mobile from 90% of the latter's gross resale revenues to 80% up to 41,667 MCF per billing month and 90% in excess thereof. Those agreements were filed with the Commission as Supplements #9 and #10 to United's Rate Schedule #20. Mobile then consummated its proposed contract with Ideal Cement Company to supply gas to the latter for ten years at 12¢ per MCF. The Alabama Public Service Commission approved that contract. Not only United but the Commission recognized the contract as late as July, 1952, when the Commission allowed United to substitute in its filed tariff a flat rate of 10.7¢ per MCF in place of the percentage rate Mobile had been paying. As United advised Mobile, this substitution was

[2] Jurisdiction is obtained by reason of Section 19(b) of the Natural Gas Act, 52 Stat. 831; 15 U.S.C. Section 717r(b) (1952).

made under the Commission directive to convert from percentage to fixed sum and was almost identical with the amount the Mobile percentage rate actually figured.[3]

On June 24, 1953, United filed with the Commission proposed increased rates, including a rate of 14.5¢ per MCF for industrial use gas for Mobile. On July 10, 1953, the Commission ordered a hearing on the lawfulness of those rates, suspended them pending the hearing with the exception of the new Mobile rate, and ordered that hearing to be consolidated with an earlier proceeding investigating all of United's rates. The new rate for Mobile being for industrial use was not subject to suspension under Section 4(e) of the Act. As a result it became operative July 25, 1953. Mobile, on July 16, 1953, attempted to intervene in the consolidated proceeding. On August 4, 1953, it filed a petition with the Commission setting up the above situation and asking the Commission to amend its order of July 10 so that United's new filing in so far as it affected the Ideal contract would be rejected and the 14.5¢ rate would not be permitted to take effect. In the alternative it requested a hearing on the lawfulness of the filing of that rate and

---

[3] In Tyler Gas Service Co. v. United Gas Pipe Line Co., D.C. Tex., Dec. 23, 1953, unreported, (on appeal, 5th Cir.), United had agreed to just such an arrangement as Mobile made with Ideal—that is the furnishing of natural gas at a reduced rate. There the period was sixteen years.

In that suit there was a denial of an application for an injunction to prevent United from moving before the Commission for permission to collect its new rate for domestic use gas until the reasonableness of that rate had been finally determined by the Commission. There was a contract involved but it had already been modified in what seems to have been an adversary proceeding. According to the opinion of the district judge the "* * * plaintiffs concede that the Commission on final hearing may fix the rates at a figure which it determines to be reasonable, which may be at variance with and in complete disregard of the contract rates, * * *." The all important question before us of whether there should be a hearing on the reasonableness of an existent unchanged approved contract prior to the acceptance for consideration of the new rate and prior to the determination of the reasonableness of that new rate was not before the court.

It should be emphasized also that the fact that Tyler concerned a rate for sale of gas for domestic use of itself sets that action apart from the issue of this appeal. In Tyler under Section 4(e) the Commission could and did suspend the effective dates of the increased rates for five months after which period it could order any subsequent collections to be held subject to refund in the event the new rates were ultimately found to be unlawful.

asked that if Mobile was obligated to pay United the increased rate, United be directed to hold those payments subject to refund to Mobile in the event the new rate was ultimately determined to be unlawful. At that stage no action had been taken on Mobile's application to intervene and the new rate had been governing since July 25th. As a consequence Mobile amended its petition and urged the Commission that it be made a separate cause. That prayer was granted as was United's later petition to intervene in the new proceeding. On December 7, 1953 the Commission on the pleadings denied the prayers of Mobile's petition and dismissed it. On February 4, 1954, the Commission refused rehearing to Mobile. This petition for review of the Commission's decision followed.

Mobile's main point is that its United contract with respect to Ideal is a valid agreement which cannot be set aside by United's unilateral action of filing an increased rate schedule. It frankly recognizes the Commission's paramount authority and concedes that if after a proper proceeding the Commission found the contract rate to be against the public interest it could modify it or set it aside entirely.

The Commission contends that where a natural gas company files a rate schedule under 4(d) of the Act that rate is to be charged unless suspended initially or disapproved finally by the Commission after investigation and hearing; rates for industrial use not being subject to suspension when filed become effective thirty days thereafter until finally passed upon by the Commission. The latter insists that even where as here the rate conflicts with an admittedly preexisting filed contract the distributor is given no chance to defend its contract, on which it has made approved commitments, before that contract is to all practical purposes abrogated.

It is undisputed that under the ordinary 4(e) proceeding which the Commission has instituted with reference to

the new rate schedule involved the dispositive question before the Commission is whether the increased rates are just and reasonable. 4(e) makes this plain when it says:

> "* * * At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible."

In other words if in the pending hearing United can show that its new filed rate for Mobile is reasonable that ends the matter and the new rate stands. No consideration will be given to the accepted contract, the circumstances under which it was entered into, the long term commitments sanctioned by the Commission and whether the rate fixed by it is unreasonable and against the public interest under the facts. What petitioner is endeavoring to do is have its contract passed upon in the first instance prior to authorization for filing of United's new rate and the consideration of whether that rate is currently reasonable.

The Commission maintains that 4(d) of the Act upholds its stand. That section provides, as far as we are primarily concerned, that "no change shall be made by any natural-gas company in any such rate * * * or *contract* relating thereto, except after thirty days' notice to the Commission and to the public." (Emphasis supplied). This

---

[4] Section 4(d) of the Act reads as follows:

"Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published."

means, according to the Commission, that since under 4(e) it does not have the power to suspend an industrial use gas rate, United can fundamentally cancel the Mobile contract despite the fact that as of now Mobile is bound for its duration to Ideal, subject only to the Commission later passing finally upon the rate. And in the Commission thought this can take place without any statutory notice to Mobile or an opportunity for Mobile to be heard regarding its contract rate. The practical result of this is that Mobile in living up to its contract with Ideal is supplying natural gas to that company for 12¢ per MCF and may well be forced to continue to do so until the expiration of its contract in 1956. Meanwhile Mobile must pay United 14.5¢ per MCF for the same gas it delivers to Ideal though its contract with United has never been questioned by the Federal Power Commission or in any way construed to be against the public interest.

The Commission and intervener rely to a large extent upon *Union Dry Goods Co. v. Georgia P.S. Corp.*, 248 U.S. 372 (1919), and *Midland Realty Co. v. Kansas City Power & Light Co.*, 300 U.S. 109 (1937). The first case is quoted by the Commission as holding at page 375: "That private contract rights must yield to the public welfare, where the latter is appropriately declared and defined and the two conflict, has been often decided by this court." The principle stated is of course sound law and is expressly uncontroverted by petitioner. In the Union litigation there had been a hearing before the Georgia Commission on the question of the reasonableness of the contract rates. The Commission found that they were unlawfully discriminatory. Here, as we have seen, Mobile had no opportunity to defend the contract rate prior to the new rate coming into being.

Midland does lend some support to the position of the Commission and the intervener. But there the rates filed by the utility were not opposed and were permitted by the

Missouri Utility Commission without hearing.[5] Far more important than that the decision is based upon a state court interpretation of a state statute. The question litigated and passed upon was whether a Missouri statute as construed by the Missouri Supreme Court violated the federal constitution. That sort of problem is not presented in this action.

Another case involving a state court explanation of a state law is *Wichita R.R.* v. *Public Utility Commission*, 260 U.S. 48 (1922).[6] That came into the federal courts through diversity of citizenship and as far as it goes affords strong help to petitioner. In it the Kansas Commission without any finding of unreasonableness and despite a duly filed contract for the sale of electric power authorized a surcharge. The railroad had appeared in the Commission proceeding and had objected. The matter was removed to the United States District Court which restrained execution of the Commission's order.[7] The Eighth Circuit reversed.[8] The Supreme Court upheld the district court, quoting with approval from the opinion of the Kansas Supreme Court in *Kaul* v. *American Independent Telephone Co.*, 95 Kan. 1, 147 Pac. 1130 (1915) where it is stated that:

> "* * * The passage of the act did not automatically overthrow contracts, nor set aside schedules of rates which had been agreed upon. Neither did the fact that the defendant published and filed a schedule of rates with the public utilities commission abrogate the contract. In any event, rates previously agreed

[5] A very real distinction exists between the position of the realty company in Midland and that of the present petitioner. Hearings were held on similar contracts and the latter found unreasonable prior to the utility company's suit against Midland being disposed of and Midland had not appeared in those hearings. In other words Midland made no attempt to attack the new rate directly before the Commission but contented itself with raising a defense in a collateral proceeding brought by the utility company.

[6] See also Atteboro Steam & Electric Co. v. Narragansett Electric Lighting Co. 295 Fed. 895 (R. I., 1924), construing a similar Rhode Island statute.

[7] Wichita's motion for judgment on the pleadings was granted. There was no reported opinion.

[8] 268 Fed. 37 (8th Cir. 1920).

upon between utilities and patrons will continue in force until the commission has found them to be unreasonable, and has prescribed other rates."

The Kansas procedure as to rates bears great similarity to the Natural Gas Act formula. Under Section 20 of that state's public utility statute[9] a public utility may file higher rates. Section 13 of the law empowers the Commission to set aside rates which after hearing have been found to be unreasonable. It is under the parallel provision in the Natural Gas Act (Section 5(a)), that petitioner contends the Commission should have functioned in passing upon United's attempt to obtain a higher rate for its gas sold to Mobile for the industrial user Ideal. Section 5(a) reads:

"Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates."

[9] Public Utility Law of Kansas, Session Laws of 1911, c. 238.

Section 5(a) was before the Tenth Circuit in Colorado *Interstate Gas Co.* v. *Federal Power Commission*, 142 F.2d 943, 954 (1944), affd. 324 U.S. 581 (1945). In that case on complaint of the City and County of Denver and the State of Wyoming the Commission held that existing rates and contracts were unreasonable. The gas companies claimed that the finding was not founded on substantial evidence. The Court said:

> "* * * The passage of the Act did not automatically overthrow the contracts into which these companies had previously entered. Neither did it ipso facto set aside the schedules of charges upon which they had agreed. Such rates and charges could be modified only after an express finding of unreasonableness. Wichita R. & Light Co. v. Public Utilities Commission, 260 U.S. 48, 43 S.Ct. 51, 67 L.Ed. 124; Allen W. Hinkel Dry Goods Co. v. Wichison Industrial Gas Co., 10 Cir., 64 F.2d 881. And the right of the Commission to make a finding of unreasonableness depends upon the existence of the fact. In the absence of substantial evidence to show that the rates and charges in existence are unreasonable, a finding to that effect constitutes the arbitrary exercise of power by administrative fiat and cannot stand. Interstate Commerce Commission v. Louisville & N.R. Co., 227 U.S. 88, 33 S.Ct. 185, 57 L.Ed. 431."

The Commission suggests that the Colorado decision is not applicable because the proceedings were under Section 5 but we fail to note any contradiction of the court's statement that filed contract rates and charges can only be set aside on an express finding of unreasonableness which in turn specifically follows the very opinion (Wichita) that the Commission asserts turns on a peculiar Kansas law. Actually the Commission time and again insists that it does not claim that the Congress in the Natural Gas Act intended to set aside contracts completely. It states flatly that the Act shows no such thought. Nevertheless on the theory of

"scheme of regulation" it argues that it be permitted to construe Section 4(d) so that in reality that consequence is obtained. In *F.P.C. v. Niagara Mohawk Power Corp.*, 347 U.S. 239, the Supreme Court made it abundantly clear that such authority "requires clear authorization," which is absent from the Natural Gas Act. In the Niagara Mohawk litigation the query was whether the Federal Water Power Act of 1920 had abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes. The Supreme Court interpreting that statute said at p. 251:

> "* * * We find nothing in the Federal Water Power Act justifying such an interpretation. Neither it, nor the license issued under it, expressly abolishes any existing proprietary rights to use waters of the Niagara River. * * * On the contrary, the plan of the Act is one of reasonable regulation of the use of navigable waters, coupled with encouragement of their development as power projects by private parties."

So here, the Natural Gas Act does not expressly permit existing contract rights to be abolished by a mere unilateral filing of new rates. The plan of the Natural Gas Act is likewise one of reasonable regulation, as evidenced by the fact that the Commission itself cannot change an existing contract rate under Section 5(a) without first finding that such rates are unreasonable.

Beyond question the Commission's action in this instance would result in further impairment of petitioner's common law rights. As the Supreme Court stated in *Texas and Pacific Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426, 437 (1907), a case cited by intervener but interpreting the Interstate Commerce Act:

> "* * * a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that

> is to say, unless it be found that the preexisting right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

See *Shaw* v. *Railroad Co.*, 101 U.S. 557, 565 (1879); *American District Telegraph Co.* v. *Kittleson*, 179 F. 2d 946, 953 (8th Cir. 1950); 3 Sutherland, Statutes and Statutory Construction (3rd ed. 1943) 164-182.

Nor is a rate contract automatically nullified merely because the return is low. In this instance there seems no doubt but that the Ideal Cement account represented important new business to Mobile and to United and that the long range price concession was made in order to obtain it. Cf. *Arkansas Natural Gas Co.* v. *Railroad Commission*, 261 U.S. 379 (1923); *Railroad & Light Co.* v. *Court of Industrial Relations*, 13 Kan. 217, 214 Pac. 797 (1923). And the fact that the Commission can change the contract does not render it void for lack of mutuality. *Southern Utilities* v. *Palatka*, 268 U.S. 232 (1925); *Hinkel Dry Goods Co.* v. *Wichison Industrial Gas Co.*, 64 F. 2d 881 (10th Cir. 1933).

With reference to the pertinent legislative history regarding such contract as before us, all three of the parties quote the colloquy between Congressman Halleck and Mr. Booth, appearing for the Illinois Public Service Commission on the bill which immediately preceded the Natural Gas Act. The accurate report of this reads:

> "Mr. Halleck. Of course, it is your idea that if this bill should pass and the Commission be given the authority contemplated in this bill, that the contract *could* be superseded or invalidated insofar as attempt to fix the rates of charges is concerned?
>
> "Mr. Booth. That certainly would be my position and we certainly would ask the Federal Power Commission promptly to consider the question as to whether or not the Natural Gas Pipeline Co. of America is earning an

unfair return upon the fair value of its property." (Emphasis supplied).

Hearings, House Committee on Interstate and Foreign Commerce, 75th Cong., 1st Sess., on H.R. 4008, at page 43.

The reasonable inference from the above is identical with petitioner's theory, namely, that the Commission has the power to eliminate a private contract; not that the latter is automatically destroyed by the unilateral action of a party thereto.[10]

There is no mention in the debates of Congress that the Act was ever intended to permit a contracting party to eliminate its existing contracts simply by giving thirty days' notice to the public and to the Commission. Instead the Act was stated to contain the "usual provisions * * * such as we find in all regulatory measures enacted by Congress,"[11] and according to the Committee report, there was

---

[10] The intervener cities, Armour Packing Co. v. United States, 209 U.S. 56 (1908), for the point that Congress intended the scheme of the Act to replace every other device, including contract provisions. That case was under the Elkins Act amendment to the Interstate Commerce Act. As the opinion itself states that amendment was adopted to make certain that all shippers be given the same treatment with one rate for a similar carriage of freight. The court also made clear that the Interstate Commerce Act contained no provision for the filing of contracts with shippers. The lack of recognition of that type of agreement in the Interstate Commerce Act was for the consideration of Congress stated the Court. Commenting on the omission of the Interstate Commerce Act to provide for private contracts the Court said at page 82: "It may be that such contracts should be recognized, giving stability to rates for limited periods; that the contracts being filed and published, and the rate stipulated known and open to all, no injustice would be done." As we have seen this possible course outlined by the Supreme Court in Armour has been followed in the later Natural Gas Act.

[11] 81 Cong. Rec. 6722 (1937):

Mr. Lea: * * *

"There are the usual provisions. Without attempting to go into detail, what I call usual provisions are those such as we find in all regulatory measures enacted by the Congress. This bill contains, for instance, administrative provisions; for rules affecting just and reasonable rates; for the power of the Commission to fix maximum or minimum rates or a specific rate after hearing; for the rule against discriminations and preferences as between consumers or localities; for the requirement that the schedules be kept open for public inspection; for the power of the Commission to suspend the rates where deemed unduly high. The bill covers

"nothing novel in its provisions."[12] It should also be noted that there was virtually no opposition to the bill from any source.[13]

The Commission itself in its brief says:

> "The reports of the Federal Trade Commission on the natural-gas industry abound with references and data concerning the contracts of gas companies most of them for long terms. It was at the time of the passage of the Act, and is now, a common and usual practice for such gas companies to contract for all sales or transportation of natural gas. Those companies which sold otherwise were exceptions."

This being so one would think that there would be at least some debate on a provision which provided for the lawful unilateral cancellation of that type of agreement if Congress had that in mind.[14]

The Commission also makes much of the provision in Section 4(e) which prohibits the Commission from suspend-

---

the question of accounting, following standard lines; of giving the Commission the power to control the accounts, including the depreciation account; and of requiring the gas companies under the regulation of this bill to conform to those accounting practices.

* * * *

"The bill makes provision for complaints and provides for hearings and has the usual provisions in reference to the production of testimony and rehearings by the Commission on petition, court review of the orders of the Commission, and, a rule that the findings of the Commission, if supported by substantial testimony, are conclusive upon courts in connection with questions that may be taken to courts.

"Those are what might be called the principal provisions of the bill."

[12] H. Rep. No. 709, 75th Cong., 1st Sess., p. 3. See Colorado Interstate Gas Co. v. F.P.C., 324 U.S. 581, 601 (1945).

[13] 81 Cong. Rec. 6725 (1937):

"Mr. Mapes: Mr. Chairman, as far as I know, there is no opposition to this bill. I do not know of any member of the House or anyone else who opposes it. It is supported by the public utility commissions of the States and by all public bodies, as far as I know, who have anything to do with or have given any particular attention to the question of the distribution and sale of natural gas to the consuming public. As a matter of fact, my attention has not been called to any opposition to it, even on the part of the gas companies themselves."

[14] The Commission points to certain evidence of the Commission's solicitor on a predecessor bill as demonstrating the intent to make filing procedure controlling irrespective of the contractual situation. There is nothing in that testimony from which it can be fairly concluded that the kind of contract before us was within the contemplation of the witness or his examiners.

ing rates for the sale of natural gas for resale for industrial use. The purpose of this provision, however, as stated by the Congressman who introduced the amendment, was "to prevent suspension in cases of industrial use *where there are short term contracts* * * *;"[15] (Emphasis supplied.) The clear implication is that Congress saw no purpose in temporarily protecting purchasers who had agreed contractually to an increase in rates. The implication is equally clear that Congress did not visualize the present circumstances where one of the contracting parties is attempting under the cover of the Act to avoid its contractual duties.

The Commission's order under review refers to Part 154 of the Commission's Regulations under the Act. Those Regulations give no assistance to the Commission's interpretation of Section 4. The very section of the Regulations under which United filed its conversion schedules[16] in May, 1952, reads as follows:

> "Section 154.85 *Status of contracts filed as rate schedules and restated.* Each contract, which is now filed as an effective rate schedule, may be continued in effect and shall be considered as an executed service agreement to the extent that the provisions thereof are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff, *until such contract expires by its presently provided terms or is replaced by an executed service agreement in a form contained in the tariff: Provided, however,* That the natural-gas company, concurrent with the filing of the tariff, shall submit, for insertion in front of each such contract, a statement identifying the provisions thereof which are not superseded by or in conflict with other applicable provisions of the rate schedules and general terms and conditions of the tariff and which are to remain in ef-

[15] 81 Cong. Rec. 6727 (1937).

[16] There is no contention that the instant contract was changed by the conversion order replacing the percentage rate by a fixed rate. The latter as has been mentioned was substantially the same as the old percentage rate and inferentially became a part of the unchanged contract.

fect: *Provided, further, however, That agreements intended to effect a change or amendment in such contract may be made only by the execution of a form of service agreement contained in the tariff.*" (Emphasis supplied in part.)

United's filing on June 24, 1953 did attempt "to effect a change" in an unexpired contract without "the execution of a form of service agreement contained in the tariff." This case is therefore distinguishable from *Mississippi River Fuel Corp.* v. *Federal Power Com'n*, 202 F. 2d 899 (3rd Cir. 1953), where we held that all the filing requirements had been complied with, and where there was apparently no existing filed contract. Moreover, we assumed for the purposes of that case "that the Commission has the power, implied from its authority to make rules and regulations, to reject a proposed filing which does not conform to such rules and regulations." *Mississippi River Fuel Corp.* v. *Federal Power Com'n, supra* at 901. See 18 CFR Section 154.24.[17]

In view of the above language in the Commission's own Regulations and of the complete absence of suggestion in the statute or in the legislative history that the Act was intended to authorize the abrogation of existing contract rights by means of the unilateral substituted rate procedure, we hold that the Commission erred in not rejecting United's Revised Sheets Nos. 39 and 40 in so far as they affected the Ideal contract. To do otherwise would be an attempt by us to legislate judicially since the construction of 4(d) as contended for by the Commission and the intervener is not warranted by the statutory language. *F.P.C.* v. *Niagara Mohawk Power Corp., supra.* Any changes in 4(d), particularly of the radical nature urged, would be for the consideration of the Congress, not for this court.

[17] "Section 154.24 *Rejection of material submitted for filing.* The Commission reserves the right to reject any material submitted for filing which . . . fails to comply with the requirements set forth in this part [Section 154]."

With this holding it becomes unnecessary for us to consider Mobile's alternative contention that even if the revised schedule be accepted for filing a subsequent separate hearing be held on the lawfulness of the filing at which time the reasonableness of the prior contract rate would be passed upon. Nor do we reach Mobile's contention that the Commission should have ordered under Section 4(e) that any monies collected after the acceptance of such filing be held subject to refund. Since we are specifically holding that the pertinent part of the order of July 10, 1953 was void because the Commission had no right to accept the filing of the new schedule without first determining the reasonableness or unreasonableness of the existing contract rates any monies, if any, collected on the basis of the erroneous order were unlawfully collected and should be returned to Mobile. *B. & O. R. Co.* v. *United States*, 279 U.S. 781 (1929); Restatement, Restitution, Section 74 (1937); cf. *Arkadelphia Co.* v. *St. Louis S. W. Ry. Co.*, 249 U.S. 134 (1919).

Those parts of the Commission's order which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, will be reversed.

HASTIE, *Circuit Judge*, dissenting

The Commission's order of July 10, 1953 was lawful and proper under the terms and scheme of the Natural Gas Act. This court now is requiring that order to be changed in a way which, in my view, causes the Commission to exceed its authority under the Act. Accordingly, I dissent.

A true Copy:

Teste:

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 11,280

MOBILE GAS SERVICE CORPORATION,

Petitioner,

v.

FEDERAL POWER COMMISSION,

Respondent.

Present: McLaughlin, Staley and Hastie, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record from the Federal Power Commission, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that those parts of the order of the Federal Power Commission which dismissed Mobile's petition and which denied Mobile's request that the order of July 10, 1953 be amended to reject the filing of the Revised Sheets in so far as they affected the Ideal contract and which rejected Mobile's request for the Commission to issue an order amending Paragraph D of its order of July 10, 1953, which paragraph permitted the revised schedule to take effect, be, and the same are hereby reversed.

Attest:

Ida O. Cresroff

Clerk

September 7, 1954.

UNITED STATES OF AMERICA

FEDERAL POWER COMMISSION

Before Commissioners: JEROME K. KUYKENDALL, Chairman; CLAUDE L. DRAPER, NELSON LEE SMITH and SEABORN L. DIGBY.

In the Matter of MOBILE GAS SERVICE CORPORATION	DOCKET NO. G-2227

ORDER PERMITTING INTERVENTION, DENYING RELIEF REQUESTED, DISMISSING PETITION, AND TERMINATING PROCEEDINGS

On June 24, 1953, United Gas Pipe Line Company (United) filed First Revised Sheet No. 40 and Second Revised Sheet No. 39 to its FPC Gas Tariff, Original Volume No. 1, in Docket No. G-2210. These revised sheets contained proposed increases in rates and charges to Mobile Gas Service Corporation (Mobile) for resale for industrial use only to the Ideal Cement Company (Ideal). United requested July 15, 1953 as the effective date of the proposed increase. However, by order issued July 10, 1953, the Commission denied the waiver of the thirty-day notice period provided in Section 4(d) of the Natural Gas Act, consolidated the proceeding with Docket Nos. G-1142, G-1508, G-2019, and G-2074, and fixed July 20, 1953 as the date of hearing on the reasonableness of the proposed increased rates.

On August 4, 1953, Mobile filed a petition *In the Matters of United Gas Pipe Line Company*, Docket Nos. G-1142, *et al.*, seeking modification of the July 10, 1953 order. At that date, however, Mobile was not a party to the consolidated proceedings, and on August 7, 1953 Mobile amended its petition for modification to make a separate filing in the proceeding designated as Docket No. G-2227.[1]

[1] All relief requested by Mobile in Docket No. G-2227 is relief which more appropriately should have been sought in the docket in which the complaint arose, Docket No. G-2210. This is, however, not material.

In its petition in Docket No. G-2227, Mobile requested that:

(a) The Commission amend its order of July 10, 1953 in Docket Nos. G-1142, *et al.*, to reject United's filing of its First Revised Sheet No. 40 and Second Revised Sheet No. 39, which relate to the sale to Mobile of natural gas for resale for industrial use only to Ideal.

(b) If rejection be denied, the Commission modify the order of July 10, 1953 to direct a hearing to be held solely concerning the lawfulness of the filing of United's First Revised Sheet No. 40 and Second Revised Sheet No. 39.

(c) The Commission issue an order amending paragraph (D) of its order of July 10, 1953 "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein."

(d) The Commission issue an order directing United that any increased rates collected from Mobile for resale to Ideal be subject to refund after hearing and determination (i) that the filing of First Revised Sheet No. 40 and Second Revised Sheet No. 39 is illegal, or (ii) that such revised sheets are unjust and unreasonable.

Mobile alleges in its petition that, on June 28, 1946, it had entered into an agreement with United by which United agreed to accept 80 per cent of the proceeds of Mobile's resales to Ideal up to 41,667 Mcf per billing month and 90 per cent of the proceeds of all sales in excess of 41,667 Mcf per billing month even though Mobile's resale price should amount to less than 16 cents per Mcf. This agreement was filed with the Commission as Supplement No. 10 to Supplement No. 7 to United's Rate Schedule FPC No. 20. On July 3, 1952, United filed a restatement of its FPC Gas Tariff, Original Volume No. 1, in which, without altering

the contract provisions; United's rate to Mobile for resale to Ideal was stated to be 10.7 cents per Mcf.

In its petition Mobile claims that, in reliance upon this agreement with United, it made a 10-year contract with Ideal to supply that industrial user with natural gas at a rate of 12 cents per Mcf. United has, Mobile alleges, by its filing on June 24, 1953, in which it proposed to increase the rate to Mobile to 14.5 cents per Mcf, unilaterally abrogated the United-Mobile contract. And, Mobile further alleges, its contract with Ideal cannot be altered.

On September 14, 1953, United filed a petition to intervene and answer in Docket No. G-2227. Thereafter, on September 29, 1953, Mobile filed a reply to United's petition to intervene and answer.

Turning first to Mobile's request that United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 be rejected, it is apparent that such relief must be denied. For clearly, Section 4(e) contemplates the filing of rate increases for sales for resale for industrial use only, otherwise the proviso prohibiting the suspension of such rate filings would be purposeless. And since United's filing of its First Revised Sheet No. 40 and Second Revised Sheet No. 39 was made in conformity with the requirements of Section 4 of the Act and Part 154 of the Commission's Regulations thereunder [18 CFR, Part 154], it is, therefore, not subject to rejection. Indeed, a natural-gas company may initiate a rate increase only pursuant to the provisions of Section 4.

In regard to Mobile's request that the "unreasonableness" of United's prior rate to Mobile should be determined in a separate hearing on this issue alone, it should be noted at this juncture that United's entire rate structure subject to the Commission's jurisdiction is presently under investigation and a hearing has been commenced thereon in Docket Nos. G-1142, *et al.* (the consolidated proceedings). No good reason appears why the issues in Docket No. G-2210 should be separated for hearing. In fact, the contrary

appears, for as the Commission stated in its order consolidating Docket No. G-2210 with Docket Nos. G-1142, *et al.*:

> "The proposed increase in rates and charges raises issues respecting rate of return, rate base including working capital, cost of service, allocation, appropriate test year, jurisdiction, and discrimination, among others, which are also involved in Docket Nos. G-1142, G-1508, G-2019, and G-2074."

Further practical considerations militate against separation of one of the common issues involved in consolidated Docket Nos. G-1142, *et al.*, for hearing in Docket No. G-2227. For, United has, pursuant to Commission order of July 10, 1953, already presented its direct case in support of its filing in Docket No. G-2210, including the rates to Mobile for resale to Ideal. It is obviously not in the public interest for the Commission to hear the issues pertaining to the rates involved in United's First Revised Sheet No. 40 and Second Revised Sheet No. 39 separately when issues common to all rates filed by United in Docket No. G-2210 impelled the Commission to consolidate the issues in one docket and further to consolidate that docket with others.[2]

As for Mobile's request that paragraph (D) of the order issued July 10, 1953, in Docket Nos. G-1142, *et al.*, be amended "so that it will be clear that the order of the Commission in no way purports to constitute an affirmative action or approval of said Revised Sheets or the increased rate specified therein," no amendment thereof is necessary. By paragraph (D) of said order the Commission merely refused to waive the 30-day notice period provided in Section 4(d) of the Act.

As clearly appears from paragraph (D) of said order and the full context of the order, in which the Commission found that the filed rates may be unjust, unreasonable, or

[2] By paragraph (D) of its order issued July 10, 1953 in Docket Nos. G-1142, *et al.*, the Commission ordered: "Pending such hearing and decision thereon First Revised Sheets Nos. 32 and 40 and Second Revised Sheets Nos. 31 and 39 be and the same are hereby permitted to become effective on July 25, 1953."

otherwise unlawful and ordered a hearing concerning the lawfulness of those filed rates, no approval of the rate was involved. Also, as Section 154.23 of the Commission's Regulations under the Act [18 CFR 154.23] provides:

> "The acceptance for filing of any tariff, contract or part thereof is not to be considered as approval by the Commission."

Mobile also requests in its petition in Docket No. G-2227 that rates collected by United under First Revised Sheet No. 40 and Second Revised Sheet No. 39 filed in Docket No. G-2210 be collected subject to refund. But, clearly, the power to require refunds under Section 4(e) of the Act applies only to rates which are subject to suspension and which have been suspended. An interpretation permitting refunds of that part of the sales for resale for industrial use only found not to be justified would nullify the proviso against suspension of these rates, obviously a course of action which the Commission cannot take.

Upon consideration of all the facts and questions of law presented by Mobile and United in this docket, the Commission further *finds:*

(1) Participation of United in this proceeding may be in the public interest.

(2) It is appropriate and in the public interest that Mobile's petition in Docket No. G-2227 be dismissed and the proceeding terminated.

The Commission *orders:*

(A) United be and the same is hereby permitted to become an intervener in this proceeding, subject to the rules and regulations of the Commission: *Provided, however,* That the participation of United shall be limited to matters affecting asserted rights and interests specifically set forth in the petition for leave to intervene; and *Provided, further,* That the admission of United shall not

construed as recognition by the Commission that it might be aggrieved because of any order or orders of the Commission entered in this proceeding.

(B) The separate requests of Mobile, more specifically set forth in its petition filed on August 4, 1953, as supplemented on August 7, 1953, in this proceeding and as summarized in the third paragraph of the narrative part of this order, be and they are hereby denied.

(D) [sic] The petition of Mobile be and it is hereby dismissed and this proceeding be and it is hereby terminated.

By the Commission.

Leon M. Fuquay

LEON M. FUQUAY,
Secretary.

Adopted: December 2, 1953
Issued: December 7, 1953

Excerpts from Natural Gas Act

[PUBLIC — No. 688 — 75TH CONGRESS]
[CHAPTER 556 — 3D SESSION]
[H. R. 6586]

An Act

To regulate the transportation and sale of natural gas in interstate commerce, and for other purposes.

NECESSITY FOR REGULATION OF NATURAL-GAS COMPANIES

SECTION 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas: [52 Stat. 821 (1938); 15 U. S. C. § 717 (1946)]

* * * * * *

RATES AND CHARGES; SCHEDULES; SUSPENSIONS OF NEW RATES

SEC. 4. (a) All rates and charges made, demanded, or received by any natural-gas company for or in connec-

tion with the transportation or sale of natural gas subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges, shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No natural-gas company shall, with respect to any transportation or sale of natural gas subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every natural-gas company shall file with the Commission, within such time (not less than sixty days from the date this act takes effect) and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection, schedules showing all rates and charges for any transportation or sale subject to the jurisdiction of the Commission, and the classifications, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any natural-gas company in any such rate, charge, classification, or service, or in any rule, regulations, or contract relating thereto, except after thirty days' notice to the Commission and to the public. Such notice shall be given by filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may

allow changes to take effect without requiring the thirty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint of any State, municipalty, or State commission, or upon its own initiative without complaint, at once, and if it so orders, without answer or formal pleading by the natural-gas company, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon, the Commission, upon filing with such schedules and delivering to the natural-gas company affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect: *Provided,* That the Commission shall not have authority to suspend the rate, charge, classification, or service for the sale of natural gas for resale for industrial use only; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of the suspension period, on motion of the natural-gas company making the filing, the proposed change of rate, charge, classification, or service shall go into effect. Where increased rates or charges are thus made effective, the Commission may, by order, require the natural-gas company to furnish a bond, to be approved by the Commission, to refund any amounts ordered by the Commission, to keep accurate accounts in detail of all amounts received by

reason of such increase, specifying by whom and in whose behalf such amounts were paid, and, upon completion of the hearing and decision, to order such natural-gas company to refund, with interest, the portion of such increased rates or charges by its decision found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the natural-gas company, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible. [52 Stat. 822 (1938); 15 U. S. C. 717c (1946)]

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 5. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint of any State, municipality, State commission, or gas distributing company, shall find that any rate, charge, or classification demanded, observed, charged, or collected by any natural-gas company in connection with any transportation or sale of natural gas, subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory, or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order: *Provided, however, That* the Commission shall have no power to order any increase in any rate contained in the currently effective schedule of such natural gas company on file with the Commission, unless such increase is in accordance with a new schedule filed by such natural gas company; but the Commission may order a decrease where existing rates are unjust, unduly discriminatory, preferential, otherwise unlawful, or are not the lowest reasonable rates.